

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

LABORERS DISTRICT COUNCIL OF MINNESOTA  
AND NORTH DAKOTA

and

Case 18-CC-1485

LAKE AREA FENCE, INC.

*David M. Biggar, Esq.*, for the Acting General Counsel.  
*Brendan Cummins, Esq.*, of Minneapolis,  
Minnesota, for the Respondent/Union.  
*Michael McCain, Esq.*, of Minneapolis,  
Minnesota, for the Charging Party.

DECISION

Statement of the Case

MARK D. RUBIN, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on July 27, 2010, based on a charge filed by Lake Area Fence, Inc. (Charging Party or Lake Area) against Laborers District Council of Minnesota and North Dakota (Respondent or Union) on May 12, 2010.

The Regional Director's complaint, dated June 10, 2010, alleges that the Union violated Section 8(b)(4)(ii)(B) of the Act by refusing Lake Area's request to enter into a Section 8(f) collective-bargaining agreement, in order to force or require Lake Area to cease doing business with Century Fence Company (Century). The complaint's theory is that the Union wanted Century to become a party to a collective-bargaining agreement with it, that Century declined, and that the Union's actions were designed to enmesh Lake Area (the asserted neutral), into its labor dispute with Century (the asserted primary). The Union defends by admitting that it has refused to sign a collective-bargaining agreement with Lake Area, but denying that such action was engaged in for secondary purposes, and instead was motivated by assertedly legitimate concerns as to whether Lake Area was financially or otherwise capable of living up to the terms of a union contract, or because Lake Area was not forthcoming with information requested by the Union or lied to the Union in respect to such information.

At the trial, the parties were afforded a full opportunity to examine witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally, and to file briefs.

Based on the entire record, including my observation of witness demeanor,<sup>1</sup> and after carefully considering the briefs of all parties, I make the following

## Findings of Fact

5

### I. Jurisdiction

At all material times, the Charging Party has been an employer engaged in the building and construction industry, has maintained an office and place of business in Lindstrom, Minnesota, and has been engaged in business as a fencing contractor, including as a subcontractor to Century. Further, Century, an employer engaged in the building and construction industry, has maintained its corporate offices in Pewaukee, Wisconsin, an office and place of business in Forest Lake, Minnesota, and has been engaged in business as a commercial fencing contractor performing services for, among others, the States of Wisconsin and Minnesota, and for non-government entities. In the course of said business operations during the past 12 months, Century has received gross revenues in excess of \$1,000,000, and has purchased and received materials valued in excess of \$50,000, which materials have been shipped to Century's jobsites in the State of Minnesota, directly from points located outside the State of Minnesota.<sup>2</sup> Based on such, Century has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

10

15

20

### II. Labor Organization

I find, and the Respondent admits in its answer filed herein, that the Respondent has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

25

### III. Alleged Unfair Labor Practices

#### The Players

30

#### Respondent Union

35

The Union is a council of seven independent local unions with 11,000 members, operating in Minnesota, providing various services to the local unions, including facilitating meetings, coordinating activities between the locals, and representing the local unions and their members. Approximately 950 employers, all in the construction industry, are signatory to collective-bargaining agreements with the Union.<sup>3</sup>

40

Many of these collective-bargaining agreements are multiemployer agreements between the Union and contractor associations. The "Highway-Heavy" agreement (Agreement), which the Union negotiates with the Minnesota General Contractors Association (Association), and which covers fence installation among other areas of construction work is involved in the instant

45

---

<sup>1</sup> In the absence of a more detailed discussion as to a particular issue of fact, and in general, my findings as to disputed facts include a consideration of the demeanor of a witness during testimony.

50

<sup>2</sup> Credited, and uncontroverted, testimony of Don Witte, Minnesota Branch Manager for Century.

<sup>3</sup> All of which are Section 8(f) agreements.

matter. While the Agreement is between the Association and the Union, it is not uncommon for the Union to enter into contracts separately with independent employers who are not members of the Association.<sup>4</sup>

According to Union President Jim Brady, the process of signing an employer to a collective-bargaining agreement begins with contact which may be initiated by either party. The Union solicits the prospective signatory employer to complete a "new contractor processing form" (processing form), which the Union utilizes, according to Brady, "to get information on contractors to make sure they are contractors . . . getting background information to make sure they're legitimate." Employers who choose to be bound independently to the Union's Highway-Heavy agreement, sign the Union's "acceptance of agreement form (acceptance form)."<sup>5</sup> The agreement, by its own terms, is intended to become effective, "when signed by the employer, an authorized local union or district council representative, and the president of the Council." Brady testified that all such agreements are subject to his approval.

The Asserted Primary: Century

Century, headquartered in Pewaukee, Wisconsin, is engaged in the commercial fencing business, including fencing work along highways, and at prisons and airports, with operations in various north central states including Wisconsin, North Dakota, South Dakota, northern Iowa, and Minnesota. The branch in Forest Lake, Minnesota, is managed by Branch Manager Don Witte, who has served in that position since June 2006.<sup>6</sup> No Century employees perform actual fencing installation work, all of which is subcontracted to fence installation contractors, and Century maintains no collective-bargaining agreements with any union. Century bids on, and contracts for, fencing installation work on both union and nonunion construction projects.

Century submits bids directly to the general contractors or prospective general contractors on commercial construction projects. If its bid for a project is successful, Century processes the work orders, bills and orders the materials for the project, assigns a construction superintendent to oversee its work on the project, assigns or contracts with a subcontractor for the installation labor, arranges for a date and time for the subcontractor to perform the work, and transmits the project blueprints to the subcontractor.

After Century subcontracts the installation work, it arranges for the fencing materials and supplies to be drop-shipped to the construction site. Materials are either directly shipped from the manufacturer to the jobsite and unloaded by the subcontractor's installation crew, or shipped via one of Century's trucks from either its Minnesota or Wisconsin warehouse, and unloaded by the subcontractor's employees.

When the subcontractor appears at the construction site, the area for fence installation is already "marked out for them ready to install, and they bring their own truck and equipment and workers to install the fence." All workers performing actual fence installation are employed by the subcontractor, and not by Century. Century follows this same practice in subcontracting the fence installation work, whether working on union or nonunion projects, and has operated in this

<sup>4</sup> Credited testimony of the Union's president and business manager, Jim Brady.

<sup>5</sup> The form begins: "The undersigned Employer hereby accepts and agrees to be bound to the standard printed Collective Bargaining Agreement..."

<sup>6</sup> Century performs no residential fencing. A division of Century also performs highway pavement marking work. While the Forest Lake, Minnesota branch manages Century's work in the mentioned states, about 70% of the work is performed in Minnesota.

manner during 2008, 2009, and at least through the date of the hearing herein in 2010.<sup>7</sup> The two main subcontractors Century utilized for performing the fencing installation work at union jobsites, at least during 2008, were Winslow Fence (Winslow) and Mid-America Fence (Mid-America).

5

Century's competitor for commercial fencing in the area served by its Forest Lake, Minnesota office is Keller Fence (Keller), a signatory to the Agreement,<sup>8</sup> unlike Century. Keller's area operation is staffed, at least in part, by three former Century employees who left Century for Keller within the past 4 years, including Mike Mistele, Keller's general manager, Steve Wilson, Keller's sales manager, and Nathan Roush, Keller's construction superintendent.

10

Union Business Representative Steve Buck<sup>9</sup> testified that Mistele has told him that "it would be nice" if Keller's competitor, Century, were made a party to the Union's collective-bargaining agreement. Buck further testified that, based on his experience in the industry, he assumed that it would be good for Union signatory Keller if Century became a signatory to the contract because "it creates a level playing field for all the work they bid."<sup>10</sup>

15

Buck further testified that he and Brady have met with officials of Century, "and offered them a collective-bargaining agreement and expressed our interest to have them become signatory." Century's branch manager, Witte, testified that at some point Buck told Witte that the Union's position was that it wanted Century to sign the collective-bargaining agreement, and then the Union would allow Century's subcontractors to sign the collective-bargaining agreement, which would allow Century to work for general contractors who were signatory to an agreement with the Union.

25

Buck's alleged statement to Witte is consistent with the Union's position stated on the record and in its brief that article 16 of the Agreement prohibits signatory employers, including general contractors, from subcontracting work performed by the Union's members to any employer not a party to a labor agreement with the Union. Thus, in the Union's view, any general contractor, a party to a contract with the Union, would be precluded from subcontracting work to Century, which is not a party to a contract with the Union, even if Century were to, in turn, subcontract the work to contractors signatory to the Agreement with the Union.

30

In response to this position of the Union, Century began sending two different form letters signed by Witte, explaining its position to general contractors overseeing union construction sites.<sup>11</sup> Witte, in one of the form letters which Century attached to bids to general contractors for work, stated, "In the event that the attached bid becomes a contract and union labor is required, Century Fence Company intends to subcontract all on-site installation labor to

40

---

<sup>7</sup> This description of Century's method of operation, is from the credited and uncontroverted testimony of Witte.

<sup>8</sup> In fact, the largest contractor, signatory to the Union agreement.

45

<sup>9</sup> Buck was called as a witness by the Union. He testified that he is employed as a business representative for Laborers' Local 563.

<sup>10</sup> In other words, it would put Keller in a better competitive position vis-à-vis Century, if Century were no longer competitive in bidding for non-union construction work, a position Keller had voluntarily placed itself in when it signed the Highway-Heavy collective bargaining agreement with the Union.

50

<sup>11</sup> Witte also testified that he sought the meeting because "we had gotten input from those general contractors that union representatives were pressuring them not to hire us for projects."

a fully signatory union subcontractor.” The letter further explains that Century will merely act in the capacity of a construction manager and will not employ any on-site installation employees.

Witte’s second form letter sent to various general contractors Century had previously contracted with, and others, detailed its dispute with the Union, and set forth reasons why the general contractor should choose to continue to work with Century. In this letter Witte describes the Union’s dispute with Century as follows: “The central issue is the Laborers collective bargaining agreement and the demand that Century Fence become signatory.”

Witte testified that the dispute with the Union has been ongoing during the time he has been branch manager, but “seemed to increase during the 2007 construction season. There seemed to be more general contractors that were aware of the situation and were less likely to work with us.” On cross-examination, Witte was asked by the Respondent’s counsel, “The problem that you were concerned about was that the Union was enforcing their [sic] subcontracting clause against general contractors to require removal of Century Fence from jobs, right?” Witte answered, “Yes.” Witte scheduled a meeting with Union officials in the spring of 2008, just before construction season began in Minnesota, to explore the possibility of a mutually acceptable solution to the conflict.<sup>12</sup>

The meeting between Century and the Union took place in the early spring of 2008, at the Union’s offices in Little Canada, Minnesota. Witte and Construction Superintendent Troy Adams attended for Century, and Buck and Brady for the Union. During the meeting, Witte said that Century was interested in working out an agreement with the Union “to provide union signatory workers on site, signed with them, but that Century Fence would not sign the collective-bargaining agreement because we had no hourly employees that would be on site.”<sup>13</sup> According to Witte, Buck responded to the effect that Century would need to sign the contract to have any sort of relationship with the Union and that if it did not sign the agreement it would have an unfair advantage over signatory contractors in that Century could contract for both union and nonunion work.

Witte also testified that at the time of the meeting there were two subcontractors that Century was using to perform fence installation work on union jobsites, Winslow and Mid-America, which had “union affiliation” with locals in Iowa and Duluth, Minnesota. According to Witte, Buck said that if Century refused to sign a collective-bargaining agreement with the Union, there was no reason for the Union to sign an agreement with Century’s subcontractors, and that if Winslow and Mid-America wanted to work for other fence companies that were signatory, they could work for Keller.

Adams testified that Buck specifically said that as long as contractors worked for Century, and Century was not a signatory, the Union would not re-sign the contractors to collective-bargaining agreements. Witte testified that either Buck or Brady said that Century was on a “blacklist” with general contractors and that if Century did not sign a collective-bargaining agreement with the Union, its subcontractors would also be placed on the blacklist.<sup>14</sup>

<sup>12</sup> In its counsel’s brief, the Union, citing Witte’s testimony, refers to Century’s request for a meeting as Century’s “attempt to find a way around the subcontractor clause [of the Highway-Heavy Agreement] without becoming a signatory.”

<sup>13</sup> In its brief, the Union characterized Century’s position as seeking “to appease the Union and signatory general contractors by using union subcontractors, while still refusing to sign a union contract.”

<sup>14</sup> Witte’s testimony as to the asserted blacklist came about as follows: Counsel for the  
Continued

Buck admitted attending the meeting, but denied Adams' assertions. When asked by the Respondent's counsel, "In that meeting, did you say that you—that the Union would not sign any subcontractors of Century Fence unless Century became signatory," Buck answered "No." Buck also denied that Brady said anything to that effect.

Adams, Century's construction superintendent, testified that prior to 2008, Century "always had union-affiliated subcontractors working for us. And then, in 2008, it just became very tough to get people signed to be able to work on our projects." According to Adams, he spoke "quite a few times on the phone" with Buck about the problems Century was having obtaining Union-signatory contractors, telling Buck that "We're sending union installers, union subcontractors to the projects." Adams testified that Buck told him that Century had to be the one signed to the collective-bargaining agreement, and that the subcontractors that Century was doing business with wouldn't be resigned if they worked for Century. For his part, Buck testified that he never "told either Mr. Witte or Mr. Adams that the Union would not sign subcontractors of Century Fence." Brady testified that he never told Witte or Adams that the Union wouldn't sign contracts with any Century subcontractors because they did business with Century.

The Asserted Neutral: Lake Area Fence, Inc. (The Charging Party)

Sharon Roush, the owner of Lake Area, formed the corporation in April 2010<sup>15</sup> to operate as a subcontractor performing fencing installation work for larger commercial fencing contractors. Prior to forming Lake Area, Roush spoke to Troy Adams, construction superintendent for Century, who told her that Century had work available, more union than non-union, and that Century already had several contractors performing nonunion work. Roush credibly testified that one of her business goals in creating Lake Area was to operate under a

Acting General Counsel, on direct examination of Witte, asked "Do you recall anything else that was said at the meeting...by either you or the gentlemen from the union," and when the witness hesitated in answering, added "Do you recall if there was any discussion of a blacklist?" The Union's counsel objected to the questions as leading. I overruled the objection on the basis, that while the question was somewhat leading, counsel for the Acting General Counsel was attempting to refresh the witness's recollection where the witness appeared to have blanked out. In my view, based on his demeanor, strength of recollections, and non-argumentative manner of answering questions of all counsel, including on cross-examination, Witte is an honest and credible witness who did not, and would not, lie under oath, even when presented with a leading question. On this basis I find Witte a generally credible witness. However, as to the specific "blacklist" testimony, I find insufficient evidence that such exact term was used by Brady or Buck on this occasion. I make this finding because Adams, called as a witness by counsel for the Acting General Counsel, was not asked and did not testify to the use of this exact word by Brady or Buck, because Brady and Buck denied using such term, and because Witte did not mention the "blacklist" until prompted by counsel for the Acting General Counsel. Of course, whether or not Buck or Brady used this explicit term during the meeting is not determinative as to whether, in fact, the Union had blacklisted Century and its subcontractors. However, as to the balance of comments made by Buck at the meeting, I explicitly credit Adams and Witte, and not Buck. In this regard, based on his testimonial demeanor, non-argumentative answers to questions of all counsel, and strength or recollections, I find Adams to be a generally credible witness, as I did Witte above. Further, their testimony as to comments made by Buck is generally consistent with the testimony of Hurt as to comments made by Buck on other occasions, testimony which I find credible, *infra*.

<sup>15</sup> The state of Minnesota corporate registration papers are dated April 20, 2010.

union contract, and that after speaking to Adams, she did not consider companies other than Century to do business with. At its inception, Lake Area employed two individuals for fence installation work, Roush's son with 5 years experience, and a second individual with 14 years experience.

5

#### Lake Area's April 2010<sup>16</sup> Efforts to Secure an 8(f) Contract with the Union

About April 14, Roush called the Union's office, asked to speak to somebody about becoming a signatory contractor, and was connected to Dan McGowan, a marketing representative for the Union.<sup>17</sup> According to Roush, she told McGowan that Lake Area was a newly formed fencing subcontractor, and McGowan told Roush about the various benefits of becoming a signatory contractor, such as training and the availability of calling in extra employees when needed, and said he would mail some materials to her. According to Roush, she replied with her address and said that she would look the materials over, and would be back to McGowan if she were further interested. There was no discussion of which contractor(s) Lake Area would subcontract for. McGowan testified that he had a short conversation with Roush discussing the possibility of signing a union contract, that McGowan said he would stop by her location that Friday (April 16) and bring her "some information," and that Roush replied by informing McGowan of her address.

20

So, either as discussed, according to McGowan, or without prior notification to her, according to Roush, McGowan, along with fellow Union Marketing Representative Josh Bassais, visited Roush at her residence on April 16. According to Roush, McGowan said he decided to drop off the written materials instead of sending them, and his visit was unexpected to her. Roush testified that after some small talk, they discussed various provisions of the Agreement including wage rates, fringe benefits including health insurance, training provided by the Union, and the ability of a signatory employer to call the Union if additional help were needed. Roush asked if a signatory employer could work on nonunion jobs, and McGowan and/or Bassais replied that such an employer could work nonunion jobs, but that it was difficult to make such jobs pay sufficiently. McGowan told Roush that signing the agreement was just one step in becoming a union contractor.

30

According to Roush, at some point during the union representatives' visit, the representatives presented her with multiple copies<sup>18</sup> of the Highway-Heavy 2010-2011 wage rates, a new contractor processing form,<sup>19</sup> and an acceptance of agreement form. Roush asked which wage rate classification applied to fence installation work. McGowan answered her question, and Roush circled the answer on a copy of the contractual wage rates.

35

---

<sup>16</sup> Unless otherwise specified, all dates herein refer to 2010.

40

<sup>17</sup> McGowan described the marketing representative job as being "essentially an organizer position", with job duties consisting of increasing the Union's "market share," meeting with contractors, and signing "nonunion contractors." McGowan further testified that he is employed by "Great Lakes Regional Organizing Committee," an organizing arm of the Union.

45

<sup>18</sup> For Lake Area's two employees.

50

<sup>19</sup> McGowan testified that during the meeting, he told Roush that there was a time when the Union would sign anybody to a contract, but not any more. He testified that the information sought in the new contractor processing form helped the Union assure that contractors were legitimate. The information sought in the form includes: workers compensation carrier, Minnesota corporation "file number," federal and state eid numbers, general description of contractor services provided, employees within the last 12 months, and representative projects awarded and bidding.

Other than inquiring as to the wage classification, Roush did not question nor dispute any of the contractual provisions, nor the acceptance of agreement form. Roush signed the acceptance of agreement form and handed it to McGowan. During the meeting, there were no questions as to, or discussions of, the financial condition of Lake Area, its assets, equipment, bank accounts, what work it had performed, or with what fencing contractor(s) it planned to do business with, including Century Fence.<sup>20</sup> At some point, Roush mentioned to McGowan that her company “would be having” two employees, and that one of her two sons worked for Keller Fence.<sup>21</sup> During the meeting, Roush made some mention of the possibility of a job the following week, but when McGowan inquired as to the job, Roush replied that she was mentioning it “just in case there was a job.”<sup>22</sup>

Roush did not complete the new contractor processing form at the meeting with the union representatives. She testified that because she was not expecting their visit that day, she didn’t have some of the information requested on the form readily available.<sup>23</sup> Instead she later filled out the form and faxed it to the Union the following Tuesday, April 20. The faxed document was partially, but not fully, completed by Roush. Thus, the form requested various information as to “representative projects awarded/bidding.” Roush did not complete this area of the form,<sup>24</sup> and testified, in essence, that at the time she completed the form, Lake Area was a brand new company and, hence, there was little such information to provide. Following the meeting, McGowan brought the acceptance of agreement form signed by Roush back to the Union and gave it to his supervisor, Mike Warner, the Union’s marketing manager.<sup>25</sup>

Roush testified that on April 22 she received a call from Century Construction Superintendent Adams, who offered her installation work for Lake Area beginning on April 26 on a jobsite at “Globe College”. Adams asked her where she was “with the Union signing.” Roush replied that she didn’t know yet. The testimony of Roush and McGowan diverges significantly from this point on.

Roush testified that after speaking to Adams, she held three telephone conversations with McGowan on April 22. First, Roush called McGowan, told him that Lake Area had an opportunity to start working on April 26, and asked him “where we were with the [Union] agreement.” McGowan replied that he wasn’t sure, and would look into it and get back to McGowan.

Second, about an hour later, McGowan called Roush, and asked her which fencing contractor Lake Area intended to perform work for. Roush told McGowan Lake Area would be working as a subcontractor to Century Fence, but that it was a nonunion job for Globe College. McGowan replied that he would get back to her.<sup>26</sup>

---

<sup>20</sup> Credited, uncontroverted testimony of Roush.

<sup>21</sup> Credited, uncontroverted testimony of McGowan.

<sup>22</sup> Credited, uncontroverted testimony of McGowan. McGowan testified that he didn’t remember the words used by Roush in mentioning the “job.”

<sup>23</sup> McGowan testified that Roush told him that she did not have all the information to fill out the new contractor form, but would get it and fax the form to the Union.

<sup>24</sup> Essentially, the bottom portion of the form.

<sup>25</sup> The actual entity that serves as the Union’s organizing or “marketing” arm is the Union’s “Great Lakes Organizing Committee” (GROC), which employs both McGowan and marketing manager Warner.

<sup>26</sup> Counsel for the acting General Counsel points out, in his brief, that this is the first



Third, about an hour after the second call, McGowan called Roush back and told her that the Union would not sign the agreement with Lake Area. Roush asked McGowan what the Union's reason was for its decision. McGowan replied that if she had any questions she should call the Union's president, Jim Brady. Roush testified that in none of these conversations with McGowan did McGowan ask any questions about Lake Area's financial situation or whether it was registered to do business in Minnesota.

McGowan testified that after speaking with Roush at her residence on April 16, his next contact with Roush was receiving a phone call from her on April 26, during which Roush told McGowan that she "had a job at Globe College in Lakeville and wanted to know what the status of the contract was," and that McGowan replied that he would look into the status of the contract. McGowan testified that pursuant to his conversation with Roush, he called his supervisor, Warner, who directed McGowan to find out who the general contractor was for the Globe College construction. McGowan called Roush with Warner's question, and Roush told McGowan that she didn't know, but would call him back [with the information]. Shortly thereafter, Roush called McGowan and told him that there was no general contractor on the Globe College construction. McGowan asked Roush who Lake Area was working for on the job, and Roush replied, "Century Fence." McGowan testified that he passed this information as to Century on to his supervisor Warner.<sup>27</sup>

Roush testified that after McGowan allegedly told her that the Union would not sign the contract with Lake Area, she followed-up by calling Brady two times later on April 22, but was informed by the Union's receptionist that Brady was busy. Roush called Brady again on April 23, was again told he was busy, but this time left a voicemail message for Brady identifying herself, explaining that she was calling to inquire as to the Union's reasons for not signing the contract with Lake Area, and expressing concern that there was some discrimination either because Roush was female and her company was small, or because Lake Area planned to work for Century. When Brady did not respond to this call, she called his office again either later on April 23 or on Monday, April 26,<sup>28</sup> and this time was successful in reaching him.

According to Roush, she began the conversation with Brady by identifying herself, and telling him that she was surprised that the Union wouldn't approve the contract with Lake Area, and wondered why. Brady replied that Roush hadn't filled out the paperwork properly, referring to the Union's new contractor processing form. Roush testified that she wasn't sure which form or information Brady was referring to, and so asked him. Brady responded that he didn't know what the missing information was because he didn't have the form in front of him. Roush asked, "if it was the bottom half of the new contractor form," and Brady reiterated that he didn't know because he didn't have the paperwork in front of him. Counsel for the Acting General Counsel asked Roush "Did he [Brady] ever tell you why they would not sign the contract with Lake Area Fence?" Roush answered, "Well, my paperwork was not completed, and then later in the conversation he said that they did not sign companies that were not financially stable to pay the union benefits."<sup>29</sup> The conversation concluded with Brady telling Roush that he would "look at it

disclosure to the Union that Lake Area would be a subcontractor to Century.

<sup>27</sup> Credited testimony of McGowan. Warner was not called as a witness.

<sup>28</sup> During her initial testimony, Roush said that this call and conversation occurred on April 26. During her testimony on rebuttal, Roush appeared to rethink her original answer and testified, "I don't think it was the 26<sup>th</sup>; I think it was the 23<sup>rd</sup>. I can't remember what—the 26<sup>th</sup> was when we had the job with Globe started."

<sup>29</sup> But Roush also testified that Brady had never asked Roush any questions about her

Continued

again and get back to me the middle of the next week.” But Roush testified that she never further heard from Brady.

Brady testified that he and Marketing Manager Warner spoke about April 22, and that Warner told him about Lake Area executing the Union’s acceptance form and new contractor processing form, and that “it was urgent that they get a contract because they had work.” When asked whether he inquired or was informed by Warner as to what the work consisted of, Brady answered, “No,” Brady further testified that “he believed” that at the same time Warner gave him the forms, he told Warner that if Lake Area had work, “they need to complete the form.” When asked by the Union’s counsel what part of the form he was referring to, Brady testified, “They didn’t report that they had any employees. They didn’t report that they had any work.”

While, as noted, Roush testified that she did not further speak to Brady after the April 23 (or 26) conversation, Brady testified “I think we had a second conversation,” “shortly after” the first one. In follow-up questioning by the Union’s counsel as to this conversation that Brady thought he had, Brady testified that Roush called and wanted to know why Brady wouldn’t sign the contract, that Brady responded “the information is incomplete,” that Roush asked why, and that Brady replied that the Union needed the information to make sure that contractors are employers, that they are going to employ Laborers, that they have work they’re going to perform, and that the contractors are aware of their obligations under the contract. Brady testified that he asked Roush who Lake Area was going to work for and that Roush replied that she was going to work for Keller Fence.

Not only did Roush deny that she spoke to Brady a second time, but she explicitly denied that she ever told Brady that Lake Area was going to work for Keller Fence, and affirmatively testified that she, in fact, told McGowan that Lake Area had been offered work by Century at Globe College. As noted above, McGowan testified he reported the Century information to his supervisor, Warner.<sup>30</sup>

Brady testified that following his asserted conversation with Roush, he called Laborers’ Local 563 Business Agent Steve Buck and asked Buck to call Union signatory contractor Keller Fence (Keller), and find out whether Lake Area was, in fact, going to work for Keller. Buck reported back to Brady that Lake Area was not working for Keller and was not going to work for

financial ability.”

<sup>30</sup> From my close observation of her testimonial demeanor, Roush demonstrated the attributes of a credible witness. She readily answered questions of all counsel in a nonargumentative fashion, and appeared to strive for accuracy in her answers even correcting one answer and admitting she wasn’t sure of another. For these and other reasons, I credit her testimony when in conflict with Brady. In particular, Brady’s testimony that Roush told him that Lake Area would work for Union signatory contractor Keller, which Roush explicitly denied, is not believable because both Roush and McGowan testified that she told McGowan, truthfully, that Lake Area was going to contract with Century. McGowan even testified that he passed this information on to his superior at the Union. It makes no logical sense that Roush would truthfully inform Union official McGowan, but lie to Union official Brady, nor does it make sense that Roush would lie to Brady about doing business with a Union contractor, when she knew that the Union would easily be able to check the veracity of this information. Because I do not credit Brady that Roush told him that Lake Area was contracting with Keller, I likewise find that his testimony to the effect that the Union decided not to sign a contract with Lake Area because Roush lied to him about doing business with Keller, constituted a pretext, and was not the real reason the Union refused to sign a collective bargaining agreement with Lake Area.

Keller.<sup>31</sup> Brady testified that he later told Warner that he would not sign the contract with Lake Area because “she misrepresented the fact that she was going to work for Keller Fence and she lied to me.” When asked by the Union’s counsel when he told Warner this, Brady testified, “Probably the next day.”

While, as noted, Roush testified that she never again heard from Brady after the conversation on April 23 (or 26) during which Brady, allegedly, told Roush that he would take another look at signing Lake Area’s union contract and get back to her, she did exchange a series of e-mail messages with McGowan beginning April 29. On Thursday, April 29, Roush sent an e-mail to McGowan, to the effect that Brady had informed her (Roush) that he would take another look at signing the contract with Lake Area, and would let her know (whether he would change his mind and sign the contract). Roush, in the email tells McGowan, “I have been unable to reach him [Brady] and was wondering if you had found out if he had changed his mind. He told me we did not fill out the paperwork completely but was unable to tell me which one; I only had the actual contract and the processing form. Did I not have some form I needed? I need to know if we were accepted on a second look. . . .”

The next day, April 30, McGowan responded to Roush’s email as follows: “Sharon, I spoke briefly with Jim [Brady], he is in negotiations and apologizes for not getting back to you sooner. He is reviewing the contract and will get back to you by the middle of next week.” Then, on May 4, McGowan sent the following email message to Roush: “I have spoken to Jim Brady and he has decided not to sign Lake Area Fence to an agreement at this time. If you have any questions call Jim at 651-653-\*\*\*\*.”<sup>32</sup>

Roush responded with a final email message to McGowan on May 6. The message, in pertinent part, stated: “As I had questioned in the last email to you, Jim Brady said I did not complete the paperwork, was there some other form I was supposed to have filled out? Most times someone would be sent the form and asked for further information so I can’t believe that is really the issue. I do understand this is not your decision but I am trying to understand and I could get no better information than the incomplete form and he did not know if we would be financially viable to pay dues in the future. . . . Anyway if you could tell me if there was additional forms I needed I would appreciate it.” McGowan never responded to this final email message from Roush and never responded to either of her emailed requests for information as to what information needed to be provided.

McGowan testified that the emails between himself and Roush are accurately described and quoted as above, but that his messages to Roush were intentionally inaccurate in respect to his contact with Brady. According to McGowan, after he received the first email message from Roush on April 29, he forwarded the message to Brady and to Warner. McGowan did not speak to, nor receive a response from Brady, but Warner replied to McGowan that he should tell Roush that Brady was in negotiations and would get back to her by the middle of the following week. McGowan further testified that on May 4, Warner told him that Brady “was not going to sign Lake Area Fence to an agreement at this time and to send an e-mail to that effect.”

---

<sup>31</sup> Buck also so testified. The parties stipulated that at no time did Lake Area have a contract with Keller to perform work. There is no evidence that Lake Area either did business with Keller or intended to do business with Keller.

<sup>32</sup> McGowan testified that despite what he wrote in the e-mail message, he did not speak to Brady.

McGowan sent such an email to Roush on May 4. McGowan testified that despite what he told Roush in his email messages, he did not speak or communicate with Brady during this period.<sup>33</sup>

Century Subcontractors Mid-America and Winslow, and the Union

Counsel for the Acting General Counsel also introduced evidence as to recent past secondary boycott unfair labor practice charges filed against the Union,<sup>34</sup> involving Mid-America and Winslow.<sup>35</sup> On September 30, 2008, Century filed an unfair labor practice charge with Region 18 in Case 18-CC-1474, alleging that Local 563<sup>36</sup> violated Section 8(b)(4)(ii)(B) of the Act by refusing to renew 8(f) contracts with contractors unless the contractors ceased working with Century. On October 29, 2008, the Regional Director for Region 18 approved an informal settlement agreement of the charge entered into by the Union in which, among other things, it agreed that it “will not refuse to sign a collective bargaining agreement with or otherwise threaten, coerce, or restrain Mid-America Fencing, Winslow Fencing, or any other person to stop doing business with Century Fence Company.”

Brady testified that the Union had refused to enter an agreement with Mid-America because, assertedly, the information it provided was incomplete and Mid-America was not registered to do business in Minnesota. Brady testified as to the reasons the Union refused to enter into a contract with Winslow as follows: “Information provided on the processing form—contradictory information, different information. Took a while to sort it out. Time schedules. I was unavailable, he was unavailable, so it took a long time to finally get through it.”

Then, on December 17, 2009, Mid-America filed a charge with Region 18 against Local 563, alleging that the Union violated the Act by refusing to enter into an 8(f) agreement with Mid-America unless Mid-America ceased working with Century. The owner of Mid-America, Steven Hurt, called in the instant matter as a witness by counsel for the Acting General Counsel, testified that the charge was settled when the Union agreed to allow Mid-America to become a party to the Agreement. Mid-America, thereupon, withdrew the charge.<sup>37</sup>

Hurt also testified as to his prior experiences with Century and with the Union.<sup>38</sup> Hurt

---

<sup>33</sup> And found it more convenient to use Brady’s name, rather than Warner’s.

<sup>34</sup> Or its Local 563.

<sup>35</sup> In introducing said evidence, counsel for the Acting General Counsel stated that the evidence was being introduced for historical perspective of the dispute, and explicitly stated that the Acting General Counsel does not seek any findings in respect to said cases.

<sup>36</sup> An affiliate of the Respondent.

<sup>37</sup> Hurt’s signature on the Union’s Highway and Heavy Acceptance of Agreement form is dated January 6, 2010, and Brady’s signature on the document is dated January 26, 2010. Hurt also testified as to the settlement of the unfair labor practice charge that pursuant to the settlement of the charge, he had to register Mid-America with the [Minnesota] Secretary of State “and things like that.”

<sup>38</sup> In general, I found Hurt to be a credible witness. From my close observation, he displayed the demeanor of a witness endeavoring to truthfully testify, including responding to the questions of all counsel in a non-argumentative and consistent manner and displaying a good recollection of events and conversations. I also note that Hurt and Mid-America are not parties to the instant litigation, and stand to gain nothing immediately or directly, no matter which side prevails. Conversely, Mid-American is currently a party to a collective bargaining contract with the Respondent as a result of the settlement of its prior unfair labor practice charge, and such collective bargaining relationship could be placed in jeopardy, arguably, by

Continued

testified that 80–90 percent of Mid-America’s work is performed in the State of Minnesota,<sup>39</sup> that in early 2008 Mid-America was working in the Duluth area, and then later in the year, beginning in May or June, in Minneapolis. While working in Duluth, Century’s construction manager, Troy Adams, informed Hurt that work was available in the Twin Cities area, but that Mid-America had to become signatory to a contract with the Union.

Pursuant to this conversation, Hurt completed the Union’s New Contractor Processing Form and faxed it to the Union about April 27, 2008. Hurt testified that when he received no response from the Union to his fax, he called Buck in May or June, 2008, and told him that Mid-America wanted to sign the Union’s collective-bargaining agreement so it could “work in the area.” According to Hurt, Buck asked who Mid-America would be contracting for, and Hurt responded, “Century Fence Company.” Buck replied that because Century wouldn’t sign a contract with the Union, the Union would not allow Mid-America to sign the contract, but added that Hurt “could call Jim Brady, and if Brady said that we [the Union] could sign, then we could.”

About a day or two later, Hurt and Brady spoke on the telephone. Hurt testified that he told Brady Mid-America wanted to sign a collective-bargaining agreement, that Brady asked Hurt who Mid-America was contracting with, that Hurt replied that it was Century, and that Brady responded, “Century would not sign the contract with the Union and that was a problem for him.” According to Hurt, Brady concluded by telling him that he would call Hurt back and let him know what he decided. The next day Brady called Hurt and told him that it was not in the Union’s “best interest to sign Mid-America Fencing.” According to Hurt, Brady asked him no questions about what states Mid-America was registered to work in, about the financial condition of Mid-America, or about whether Mid-America had any problems living up to union collective-bargaining agreements in the past.

Hurt testified that he also followed-up with Buck several times during June and July, seeking to sign a contract with the Union. On these occasions, according to Hurt, Buck asked if Mid-America still intended to contract with Century, and suggested on one occasion that if Mid-America didn’t contract with Century, and instead contracted with another company, specifically naming Keller and Action Fence, then the Union would sign a contract with Mid-America. Hurt said he also called Brady in July, asking if the Union had a “change of heart.” According to Hurt, Brady asked if Mid-America was still contracting with Century, and when told by Hurt that it was, told Hurt that he would get back to him. Brady asked no questions as to Mid-America’s financial condition or whether it was registered to work in Minnesota. Hurt did not testify that Brady specifically told him that the Union wouldn’t sign a contract with Mid-America because of its contracting relationship with Century and Brady, of course, denies that he ever specifically told Hurt such.

Buck was called as a witness by the Respondent, and the Respondent’s counsel asked Buck a single question as to conversations with Hurt, as follows: “Did you ever tell Steve Hurt that you wouldn’t sign Mid-America Fencing because they do business with Century Fence?”

Hurt’s testimony herein, adverse to the Union’s interests. Thus, it would appear that Hurt’s testimony herein is against his, and Mid-America’s self-interest. For these reasons, and others discussed elsewhere herein, I have credited Hurt’s testimony when in conflict with Buck. I also note that Hurt’s testimony in respect to comments made by Buck, is consistent with the testimony of Adams and Witte as to comments made to them by Buck on other occasions. As I have credited Hurt, I also credit Adams and Witte as their testimony as to what Buck said to them, and do not credit Buck as to his denials.

<sup>39</sup> In Minnesota, Mid-America only works as a subcontractor to Century.

Buck answered, "No."

Hurt testified that in late 2009, pursuant to the possibility of Mid-America working on a parking ramp project in metropolitan Minneapolis-St. Paul,<sup>40</sup> he called Laborers Local 563 representative Tim Mackey,<sup>41</sup> and asked Mackey "about the possibility of meeting with him personally so we could . . . sign up with the Union there." Mackey responded that Mid-America "would not be signed by the Union." When Hurt asked why, Mackey responded that Hurt would have to speak to Jim Brady." Hurt testified that he called Brady "a couple of times and left messages," but that Brady did not return the calls.

### Analysis and Conclusions

Section 8(b)(4)(ii)(B) of the Act prohibits unions from threatening, coercing, or restraining any person engaged in commerce or in an industry affecting commerce, with an object of forcing any person to cease doing business with another. When enacting Section 8(b)(4)(B) in 1947, Congress sought to shield neutrals from labor disputes that were not their own, on the basis that, inter alia, neutrals were often powerless to comply with the union's demands. *Service Employees Local 525 (General Maintenance Service Co.)*, 329 NLRB 638 (1999), citing *Carpet Layers Local 419 v. NLRB*, 467 F.2d 392 (D.C. Cir. 1972). While a union may repudiate an 8(f) bargaining relationship at the expiration of the collective-bargaining agreement without violating Section 8(b)(3) of the Act, such action may violate Section 8(b)(4)(B) "if it is made for an unlawful secondary reason." *Sheet Metal Workers Local 80 (Limbach Co.)*, 305 NLRB 312, 315 (1991), *enfd* in part 989 F.2d 515 (D.C. Cir. 1993).

The Acting General Counsel argues that the evidence here establishes that Century is the primary employer with whom the Union has a labor dispute, that Lake Area is the secondary, and that the only dispute the Union maintains with Lake Area is that it does, or wants to do, business with Century. Further, counsel for the Acting General Counsel posits that the Union's refusal to enter into an 8(f) relationship with Lake area is exactly the type of secondary pressure already found by the Board to be coercive and in violation of Section 8(b)(4)(ii)(B) in *Limbach*, *supra*. Finally, the Acting General Counsel argues that the appropriate remedy herein would be an order requiring the Respondent to sign an 8(f) collective-bargaining agreement with Lake Area, albeit a position apparently contrary to the Board's remedy holding in *Limbach*.

The Respondent, in its brief, maintains that the evidence does not demonstrate secondary intent because "the Union had and continues to have lawful reasons for declining to enter into an agreement with Lake Area Fence." The Respondent further argues that 8(f) agreements are voluntary and "as there is no bargaining duty outside the term of a Section 8(f) agreement, the Union . . . at no time owed any bargaining duty to Lake Area Fence."

Finally, the Respondent argues that, unlike the facts in *Limbach* where the union applied serious economic coercion by repudiating an existing 8(f) bargaining relationship and disclaiming interest in representing the employer's employees, here, where there was no previous collective-bargaining agreement, there is "no evidence that the Union's decision not to form a new bargaining relationship and enter in a new Section 8(f) agreement with Lake Area would drive Lake Area out of business. . . ." As to remedy, the Respondent argues that "The Board's decision in *Limbach* explicitly precludes any remedy requiring the Union to bargain with

<sup>40</sup> The parking ramp is located in Stillwater, MN.

<sup>41</sup> Adams, of Century Fence, gave Mackey's phone number to Hurt.

Lake Area or restricting the Union's decision whether or not to enter into an agreement with Lake Area."

I, first, conclude, in agreement with the Acting General Counsel's argument, that the Union's primary dispute is with Century, not Lake Area. In this regard, I have found that one of the Union's signatory contractors expressed to a representative of the Union that it would be of benefit to it if competitor Century became signatory to the Agreement, that the Union has solicited Century to become signatory to the contract, that Century has spurned the Union's contractual entreaties, and that the Union has expressed resultant hostility.

I further find the credited testimony of Mid-America owner Steven Hurt to be persuasive on this issue. Hurt testified that he communicated to the Union his desire for Mid-America to sign an 8(f) agreement, that Union Business Representative Buck thereupon asked him who Mid-America would be contracting with, and that upon Hurt responding "Century," Buck told Hurt that because Century wouldn't sign a contract with the Union, the Union wouldn't allow Mid-America to sign the contract. Hurt, not a party to this case, nor with a direct vested interest as Mid-America is a current signatory to the Agreement, thus testified to an experience with the Union remarkably similar to that testified to by Roush, the owner of Lake Area. The import of their testimony is that in neither case did the Union express any inclination not to sign the fencing contractors to collective-bargaining agreements until the Union discovered that Mid-America, in Hurt's case, and Lake Area, in Roush's case, planned to subcontract for Century.<sup>42</sup>

Further, based on the credited testimony, I find that Brady's testimony as to the asserted reason(s) for the Union's refusal to allow Lake Area to become a signatory contractor to be pretextual. In this regard, I have found that, in fact, and contrary to Brady's testimony, Roush did not inform Brady that Lake Area would contract with Keller, but instead truthfully informed union organizer, McGowan, that Lake Area would be contracting with Century.<sup>43</sup> Thus, Brady's testimony that he decided not to allow Lake Area to become signatory to a contract with the Union because Roush lied to him about whom Lake Area intended to contract with, is simply a pretext, and the record demonstrates that the real reason was Roush's stated intention to do business with Century, with whom the Union had an ongoing labor dispute.<sup>44</sup>

<sup>42</sup> There is no evidence that the relationships between Century and Lake Area or Century and Mid-America are anything other than arms-length. There is no contention to the contrary.

<sup>43</sup> As McGowan so testified. McGowan further testified that he passed this information on to his superior at the Union.

<sup>44</sup> The Respondent argues in its counsel's brief, that even if Roush didn't lie to Brady about what company it planned to subcontract with, Roush lied to Brady as to the reasons she did not fill out portions of the Union's New Contractor Processing Form. Here, the Respondent argues that either on April 23 or 26, Roush told Brady that she didn't complete the form because she hadn't bid on or been awarded jobs, but that Century and Lake Area had contracted for the Globe College work on April 21. But Brady testified that he decided not to allow Lake Area to become signatory because Roush wasn't truthful as to allegedly telling Brady that Lake Area was contracting with Keller. But even here, Roush credibly testified that she told McGowan on April 22 that Lake Area had an opportunity to start working on a job for Century on April 26, and McGowan confirmed such conversations with Roush, but placed it on April 26. Once again, it makes no logical sense that Roush was forthcoming with Union official McGowan, but not with Union official Brady. Finally, Roush filled out and faxed the form to the Union on April 19, two days before Lake Area's contract with Century. Thus, at the time she filled out the form, there is no evidence that Lake Area had any work or contracts for work.

I, thus, conclude that an objective of the Union's action in rejecting Lake Area's request to become signatory to the Agreement, was to require Lake Area to cease doing business with Century, and reject the Union's argument that it acted because Roush lied to Brady as to whom Lake Area planned to contract with.<sup>45</sup> However, even if I had reached the conclusion that, in fact, the Union had established that a reason for its action was as testified to by Brady, this would not change my findings that it also acted in order to force Lake Area to cease doing business with Century. Such motivation has been amply demonstrated by the credited testimony of various witnesses, as set forth above.

Under these circumstances, the Acting General Counsel has established that the Union has engaged in secondary boycott activities. "It is sufficient to establish a violation of Section 8(b)(4)(B) that *an* objective of the union's secondary action, although *not necessarily the only objective*, is to force the secondary employer to cease doing business with the primary party." (Emphasis contained in the original.) *Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO v. NLRB*, 467 F.2d 392, fn. 13 (D.C. Cir. 1972), citing *Electrical Workers v. NLRB*, 341 U.S. 694, 700 (1951) and *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689 (1951). Such an objective has been amply demonstrated here.

Having concluded that the Respondent's actions against Lake Area were directed at influencing its relationship with Century and therefore constituted secondary activity, the question becomes whether these secondary actions violated Section 8(b)(4)(ii)(B) of the Act. Counsel for the General Counsel contends that the controlling law is set forth by the Board in *Limbach*, which, he argues, is analogous on its facts to the instant case. The Respondent's counsel maintains that the Board in *Limbach* dealt with circumstances in which the union and secondary employer had an ongoing 8(f) relationship, and that the union refused to renew the relationship at the contract's end by disclaiming interest in continuing to represent the secondary employer's employees. The Respondent argues that because in the instant case there never was an 8(f) relationship between the Union and Lake Area, the Union's decision not to enter into a new 8(f) relationship with Lake Area was not economically coercive because there is no evidence that said action "would drive Lake Area out of business or deny Lake Area any employees it had been previously using."<sup>46</sup>

In *Limbach*, the General Counsel alleged that by disclaiming interest in representing the employer's employees and repudiating the 8(f) bargaining relationship upon expiration of the 8(f) collective-bargaining agreement, the union(s) coerced and restrained the employer by "depriving it of its source of sheet metal workers, thereby, in effect, driving it out of business. . . ." *supra* at 314. In the instant case, the Acting General Counsel alleges, in essence, that the Union refused to enter into an 8(f) relationship with the neutral employer, Lake Area, in order to

---

<sup>45</sup>I, likewise, reject any argument that the Union ultimately refused to sign a contract with Lake Area because Roush did not provide requested information to the Union. In this respect, Brady explicitly testified that he decided the Union would not sign a contract with Lake Area because Roush lied to him about which company Lake Area planned to do business with. Second, the weight of the evidence demonstrates that the Union ultimately rejected Lake Area only after Roush informed the Union that Lake Area planned to work with Century. Finally, despite Roush's repeated attempts to ascertain from Union officials whether she needed to submit further information, the Union displayed little interest in communicating to her whatever information was lacking.

<sup>46</sup> Respondent counsel's brief.



force Lake Area to discontinue doing business with Century, thereby coercing and restraining Lake Area by, in effect, precluding its ability to perform work on union jobsites.

The Respondent's argument that *Limbach* is factually inanalogueous to the instant case is inviting, but unpersuasive. Indeed, the facts are different in that *Limbach* involved a previously ongoing 8(f) relationship unlike the instant case where the Union refused Lake Area's request for an initial 8(f) contract. But the practical effects of the unions' actions in the two cases are the same and the results are economically coercive. That is that the secondary employers in both cases, neither with the power to influence the labor relations of the primary employer with whom the unions had disputes, were effectively put out of business or had their businesses economically impacted by the actions of the unions. The fact that in *Limbach* an ongoing enterprise was affected or that here it was a fledgling enterprise, doesn't negate or change the fact of economic impact.

In *John Deklewa & Sons*, 282 NLRB 1375, 1386 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 NLRB F.2d 770 (3d Cir 1988), cert. denied 488 U.S. 889 (1988), the Board held that on the expiration of an 8(f) contract, either party may lawfully repudiate the bargaining relationship and "a union without a collective-bargaining agreement may lawfully disclaim interest in representing a group of employees." An 8(f) contract is, thus, a voluntary undertaking between agreeing parties.

But here, the evidence demonstrates that the Union's intent in declining to allow Lake Area to become signatory to the Agreement was to force Century to become a signatory contractor by depriving it of subcontractors to work on union jobsites unless it agreed to a collective-bargaining agreement with the Union. It is inherent that in this method of persuading Century to become a union contractor, pressure must first be applied to neutral secondary employers such as Lake Area, employers without the ability to influence the labor relations of Century. As the Board said in *Limbach*, it is this secondary object—to enmesh Lake Area in the Union's dispute with Century, with the aim of compelling the latter to become a signatory to a contract with the Union—that renders the Union's otherwise legal refusal to enter into an 8(f) relationship with Lake Area, unlawful. *Limbach*, supra at 315. And it is exactly such neutral secondary employers as Lake Area that Congress, by enacting Section 8(b)(4)(B), intended to shield from secondary pressure, such as that imposed by the Union herein. Accordingly, I find that the Respondent has violated Section 8(b)(4)(ii)(B) of the Act, as alleged in the complaint.

#### CONCLUSIONS OF LAW

1. Century Fence Company has been at all material times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Lake Area Fence, Inc. has been at all material times an employer engaged in the building and construction industry.
3. The Respondent, Laborers District Council of Minnesota and North Dakota has been at all material times a labor organization within the meaning of Section 2(5) of the Act.
4. The Respondent has been at all material times engaged in a labor dispute with Century Fence Company.
5. The Respondent has not been engaged in a labor dispute with Lake Area Fence, Inc., at any material times.
6. The Respondent, by refusing to enter into an 8(f) collective-bargaining agreement with Lake Area Fence, Inc., in order to force or require Lake Area Fence Inc., to cease doing business with Century Fence Company, has been threatening, coercing, or restraining any person engaged in commerce or in an industry affecting commerce, with an object thereof of forcing or requiring any person to cease doing business with any other person, in

violation of Section 8(b)(4)(ii)(B) of the Act.

7. The unfair labor practice found above affects commerce within the meaning of Section 2(6) and (7) of the Act.

5

#### THE REMEDY

At the hearing herein, counsel for the Acting General Counsel amended the complaint “to seek a special remedy—that Respondent be required to sign its Highway and Heavy Agreement with Lake Area Fence.”<sup>47</sup> In support of his position, counsel for the Acting General Counsel points to Supreme Court decisions in which the Court has stated that “Section 10(c) . . . charges the Board with the task of devising remedies” and that the Board’s remedial power is “a broad discretionary one, subject to limited judicial review.”<sup>48</sup> Counsel for the General Counsel posits on brief, that since the parties here assertedly reached agreement on a contract,<sup>49</sup> and the contract would have been signed but for the Respondent’s unfair labor practice, the Board should exercise its remedial authority to order the Respondent to sign the contract. The Respondent maintains that the parties never reached agreement on the terms of a contract, and that the Board’s holding as to remedy in *Limbach*, where it refused to either issue a bargaining order or order the union to sign the contract, is fully applicable here.

20

In *Limbach*, the Board found that the respondent union therein violated Section 8(b)(4)(ii)(B)<sup>50</sup> when it disclaimed interest in representing the employer’s employees, with a secondary objective. In addition, in *Limbach*, the Union entered into a new collective-bargaining agreement with the employer association, which contract, by its terms, did not include the employer. But still, the Board explicitly declined to provide an affirmative remedy, and held as follows: “However, we shall decline the General Counsel’s invitation to require the Respondents to bargain with the Employer and to include the Employer in the terms of the new collective-bargaining agreement. . . .” *Supra* at 316.

25

In so holding, the Board explained its reasoning as follows: “In our view, to issue an affirmative bargaining order would violate the principle laid down in *Deklewa*,<sup>51</sup> that an 8(f) union has no further bargaining obligation after the expiration of the contract; while requiring the Respondents [unions] to implement contractual terms that they have not agreed to (vis-à-vis the Employer) is a remedy precluded by the Supreme Court’s holding in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). I agree with the Respondent’s argument that the Board’s reasoning as to remedy in *Limbach* is applicable here, and that while the circumstances of the two cases have some differences, they are largely analogous for purposes of remedy.

30

35

In both *Limbach* and here, the unions negotiated master contracts with multiemployer associations, with the negotiations taking place between the unions and the associations, and with the agreed-to terms applying to all of the employer-members. In *Limbach*, the union and the association eventually reached agreement, and all employer members of the association were subject to the contract’s terms, but because the union had illegally repudiated its

40

45

<sup>47</sup> From counsel for the Acting General Counsel’s brief.

<sup>48</sup> Citing *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964), which, in turn, cites *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 346 (1980).

<sup>49</sup> The Highway and Heavy Agreement.

<sup>50</sup> In *Limbach*, the complaint alleged, and the Board concluded, that the respondent union also violated Section 8(b)(4)(i)(B), a circumstance not present in the instant case.

50

<sup>51</sup> *supra*

relationship with the employer, the employer was excluded from the agreement. In the instant case, I found, as pled in the complaint,<sup>52</sup> that the Union illegally refused to enter a contract with Lake Area. In neither case did negotiations as to terms contained in the contract take place between the union and individual employers.

Thus, the argument made here by counsel for the General Counsel, that the contract's terms were already agreed-to (between the association and the Union) and that the only missing ingredient for a contract was the Union's representative's signature, is equally applicable to the circumstances in *Limbach*, where the Board could have, but did not, order the union to sign a contract, the terms of which it had already agreed to with the association. Yet, the Board found such argument there unavailing despite the General Counsel's invitation for the Board to order the union to bargain with the employer and to include the employer in the terms of the collective-bargaining agreement.

The Board declined the General Counsel's invitation despite *Limbach* being an, arguably, more likely case than the instant one for the imposition of such a remedy in that the parties there had a prior collective-bargaining agreement and prior collective-bargaining relationship, and the employer had an existing work force that had been covered by the prior agreement. Here, the Union and Lake Area had no prior relationships, not even under Section 8(f), and Lake Area was a start-up company with no prior employees. I, thus, conclude that while the Union has violated Section 8(b)(4)(ii)(B) in a manner analogous to that found by the Board in *Limbach*, it would be inappropriate to issue a bargaining order, as the Board concluded in *Limbach*, and requiring the Respondent to implement contractual terms that it has not agreed to (vis-à-vis Lake Area) is a remedy precluded in *H. K. Porter v. NLRB*, supra.

I note that counsel for the Acting General Counsel argues, on brief, that, unlike the circumstances in *Limbach*, the Union and Lake Area "had reached the terms of a collective bargaining agreement prior to Respondent's unlawful refusal to sign it. . . ." Yet, the reality of both cases is that the contracts were negotiated between associations and the union, with the same terms applying to all covered employers. In *Limbach* there was, as noted by the Board, a contract the union had already agreed to (between the association and the union), which the Board could have ordered the union to apply to Limbach, if it had so chosen.<sup>53</sup> But, as noted, it declined to so order because of the principles set forth in *H. K. Porter v. NLRB*, supra. I can see no rational basis upon which to differentiate the instant circumstances from those considered by the Board in *Limbach*.

Counsel for the Acting General Counsel cites the Board's decision in *Ryan Heating*, 297 NLRB 619, 620 (1990), enforcement denied, 942 F.2d 1287 (8th Cir. 1991), where the Board ordered an employer to sign an agreed-to 8(f) collective-bargaining agreement with the union, for the proposition that such an order would be appropriate in the instant 8(f) case. But I find such argument unpersuasive because the facts are in analogous. In *Ryan*, the Board concluded that the evidence demonstrated that the employer had given verbal assent to the entire contract and had agreed to sign it. In the instant case, while the Union's representatives had presented the terms of the form contract to Lake Area, the evidence is such that the Union, instead of agreeing to the contract, declined to agree to it, albeit for illegal reasons. Indeed, this is the

<sup>52</sup> From the complaint: "At all material times, and particularly since about April 22, 2010, Respondent has failed and refused to enter into a collective-bargaining agreement with Lake Area under Section 8(f) of the Act."

<sup>53</sup> "...terms of the new collective-bargaining agreement entered into by Local 80 and SMACNA effective June 1, 1988." supra at 316,

explicit theory of violation alleged in the Acting General Counsel's complaint. In *Ryan*, the Board ordered the employer to sign the contract because it had agreed to the contract and had agreed to sign it. On the other hand, here, as in *Limbach*, the unions, while agreeing to the terms of the form contract, had not agreed to sign the contract vis-à-vis the involved employer. Accordingly, I decline to recommend imposition of the affirmative order sought by the Acting General Counsel, and instead recommend a standard cease-and-desist order.

On these findings and conclusions of law, and on the entire record, I issue the following recommended<sup>54</sup>

## ORDER

The Respondent, Laborers District Council of Minnesota and North Dakota, its officers, agents, successors, and assigns, shall cease and desist from threatening, coercing, or restraining Lake Area Fence, Inc. or any person engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring Lake Area Fence, Inc. or any person to cease doing business with Century Fence Company.

The Respondent, Laborers District Council of Minnesota and North Dakota, its officers, agents, successors, and assigns, shall, within 14 days of service by the Region, post at all of its business offices, including those of the seven constituent local unions, copies of the attached notice marked "Appendix."<sup>55</sup> Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.<sup>56</sup> Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

The Respondent, Laborers District Council of Minnesota and North Dakota, its officers, agents, successors, and assigns, shall, within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

Dated, Washington D.C. November 1, 2010

---

Mark D. Rubin  
Administrative Law Judge

---

<sup>54</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the Board shall, as provided in Sec. 102.48 of the Rules, adopt the findings, conclusions, and recommended Order, and all objections to them shall be deemed waived for all purposes.

<sup>55</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>56</sup> See, *J. Picini Flooring*, 356 NLRB No. 9 (2010).

APPENDIX

NOTICE TO MEMBERS  
Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act and ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.  
Choose representatives to bargain on your behalf.  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS. SPECIFICALLY:

WE WILL NOT threaten, coerce, or restrain, Lake Area Fence, Inc., or any person engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring Lake Area Fence, Inc., or any person to cease doing business with Century Fence Company.

LABORERS DISTRICT COUNCIL OF MINNESOTA  
AND NORTH DAKOTA

\_\_\_\_\_  
(Union)

Date \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal Agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to an agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov)

330 Second Avenue South  
Suite 790  
Minneapolis, MN 55401  
Telephone: (612) 348-1757  
Hours: 8:00 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of the posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office set forth above.